IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

CIVIL REVISION APPLICATION No 1850 of 1995

with

CIVIL REVISION APPLICATION No 1271 of 1995

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

PATEL TRIKAMLAL SHANKARLAL
VERSUS
PATEL ISHWARBHAI REVABHAI

Appearance:
1. Civil Revision Application No 1850 of 1995
MR JM PATEL for Petitioner
MR MK VAKHARIA for Respondents

2. Civil Revision Application No 1271 of 1995
MR MK VAKHARIA for Petitioners
MR JM PATEL for Respondent

CORAM : MR JUSTICE S.K. KESHOTE
Date of Decision : 30/12/1999

C.A.V. JUDGMENT

1. As both these revision applications arise from one and the same order of the 2nd Extra Assistant Judge, Mahesana, the same are taken up for hearing together and are being decided by this common judgment.

2. The first revision application has been filed by the plaintiffs and second has been filed by the defendant. For the sake of convenience, the parties are herein after referred to as the plaintiffs and the defendant.

3. The plaintiffs, as per their case, by a registered sale deed dated 24th August, 1977 purchased a Vada (open space) admeasuring 80 ft. X 50 ft. situated in the sim of village Kamana Taluka Visnagar from one Babubhai Chaturbhai for consideration of Rs.4000/-. The plaintiffs, as per their case, have constructed 6 houses in the suit vada. It is alleged that they have already left 15 ft. open place and constructed their own wall. The plaintiffs have apprehension that the defendant is trying to make construction upon the wall of the plaintiffs which he has no right to do so. It is alleged that without their permission, the defendant installed two windows on the wall of the plaintiffs. So by this way what the plaintiffs are stating that the defendant is trying to create new easementary right. He is further trying to make construction on the suit wall for which he has already purchased materials like cement, bricks etc. Though the plaintiff have asked him not to do so but he is not stopping all these activities. The plaintiff intend to fill slab on their wall but the defendants trying to interfere and is threatening the plaintiffs from making such a slab. In this factual matrix, the plaintiffs filed the suit for permanent injunction and therein they prayed for mandatory injunction. As usual, Ex.5 has also been filed wherein prayer has been made for grant of interim injunction. The defendant put appearance in the suit and contested the suit as well as the application for grant of temporary injunction. The defence has been taken that the open land is not the land belonging to, owned and possessed by the plaintiffs. It is the Government land. The State Government is necessary party to the suit and the suit deserves to be dismissed only on the ground of nonjoinder of necessary party.

Next defence has been taken that the relief which is sought by Ex.5 by the plaintiffs is not asked by them in the suit and the court has no jurisdiction to grant any relief by way of temporary interim relief which is not prayed in the main suit. The open land is admeasuring 12 ft. and which is a Street way. It is a public way and the plaintiffs have no right to file the suit. The ownership of the plaintiffs on the wall has also been contested. It is the say of the defendant that the windows installed long back and the same area being used by the defendant for air and light since long time. The defendant filed application Ex.17 and therein prayed for temporary injunction against the plaintiffs to restrain them from closing the two windows or doing any such act towards the northern side of the house of the defendant whereby his right of air and light is obstructed, till the final disposal of the suit. Second prayer has been made to grant injunction restraining the plaintiffs from constructing any slab in the Government land by taking support of the wall towards the northern side which exclusively belong to the defendant and thereby closing the right of defendant of having air and light and to grant permanent injunction restraining the plaintiff from doing such construction in the Government land.

4. Learned trial court under its order dated 31-1-1995 decided the Ex.5 and Ex.17. Ex.5 came to be rejected and Ex.17 came to be granted and temporary injunction as prayed for therein has been granted. The plaintiffs filed appeal being C.M.A. No. 31 of 1995 before the first appellate court. The appeal of the plaintiffs to the extent it relates to the challenge of the order of the trial court under which their application Ex.5 has been rejected came to be dismissed. However, the appeal to the extent it relates to the order of the learned trial court granting the application Ex.17 of the defendant came to be allowed and the order to that extent of the learned trial court was set aside. Against this order, both the parties filed these revision applications.

Heard the learned counsel for the parties.

5. Both the courts concurrently decided the matter against the plaintiffs. The courts below have not committed any illegality much less a material irregularity in exercise of its jurisdiction to hold that it is not in a position to give the decision on application Ex.5 unless both the parties produce the evidence. The rights of parties can only be decided after the evidence of the parties in the present case is

produced and I find sufficient justification in this approach of the courts below. Ex. 5 though normally has to be decided on the basis of the material produced by both the parties and the evidence in the shape of affidavits. But where looking to the complicity in the matter the court considers that the evidence of the parties is necessary to reach to the correct conclusion re: their respective rights in the disputed property and looking to the prayer made by the plaintiffs for grant of temporary injunction it is always open to the courts to decline to grant the temporary injunction on this ground. Looking to the respective claims of the parties i.e. the plaintiffs and defendant in this case certainly this approach of the courts below can not be said to be perverse or arbitrary. This is a case where the plaintiffs claim the vada land to be of their ownership whereas the defendant claims it to be the Government land. It is not unknown that in our country people are putting construction on the Government land. However, it is to be decided by the court below whether it is a Government land or the land of the plaintiffs. Till then in case the interim relief of the nature as prayed for by the plaintiffs is not granted they are not going to suffer. Admittedly two windows have been put by the defendant in the wall and otherwise also if any temporary injunction is granted of the nature as prayed for, rightly the courts have stated that it will amount to issue injunction in the mandatory form. Injunction in the mandatory form is to be granted only in exceptional cases and not as a rule. Once some act has been completed then only in rarest of the rare case may be exception but rule should have been not to grant any mandatory injunction. Moreover, in the facts of this case, I do not find any merits in the claim of the plaintiffs for grant of mandatary temporary injunction. Both the courts below have not granted temporary injunction in favour of the plaintiffs how far it is permissible to this court under section 115 of C.P.C. in the facts of this case to grant temporary injunction in their favour. The civil revision application No. 1850 of 1995 therefore deserves to be dismissed.

6. So far as the revision application of the defendant is concerned, I find sufficient merits in the contention of the learned counsel for the defendant that the first appellate court has reversed the decision of the trial court by passing a cryptic order. Prima-facie though I am not expressing any final opinion, the decision of the first appellate court is not correct. It is the discretionary order and in the discretionary

order, the first appellate court has very very limited power of judicial review. In the case of Wander Ltd. vs. Antox India (P) Ltd. reported in 1990 (Supp) SCC 727, their Lordships of the Hon'ble Supreme Court has given out the guidelines for the appeal courts hearing the appeals under Order 43 Rule 1 C.P.C. subject to which they can interfere with the discretionary order passed by the trial court. It is fruitful here to quote the relevant portion of the decision of the Hon'ble Supreme Court in the said case, which reads as under:

> The appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

7. It is not the finding of the first appellate court that the learned trial court has exercised its jurisdiction arbitrarily or capriciously or perversely. It is also not the finding of the appellate court below that the learned trial court has ignored the settled principles of law regulating the grant or refusing of interlocutory injunction. It is not permissible to the appellate court to reassess the material and seek to reach at a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at trial stage it would have come to contrary conclusion.Where the trial court has exercised its discretion reasonably and in a judicial manner, it is not permissible to the first appellate court to interfere with it merely on the grounds that it would have taken different view on the material.

8. There is yet another aspect to be looked into. Before the first appellate court reverses the decision of the trial court it is imperative to give out the

reasons of its disagreement with the findings of the trial court. So what it is required that the reasons are to be recorded for reversing the order of the trial court. Moreover, when the order has been passed in discretionary powers I find sufficient merits in the contention of the learned counsel for the defendant that the learned first appellate court has to give reasons in support of its finding that in case Ex.17 is granted then there is no meaning of the suit. Temporary injunctions are granted for maintaining existing position of the property during the interregnum. The order of the first appellate court to the extent where it has rejected Ex.17, application filed by the defendant is perverse and that part of the judgment can not be allowed to stand.

9. In the result, the civil revision application NO. 1850 of 1995 is dismissed. Rule discharged. Interim relief, if any, granted therein stands vacated. However, the parties are left to bear their own costs.

10. The civil revision application NO. 1271 of 1995 is allowed and the order of the first appellate court to the extent where it rejects the application Ex.17 of the defendant is quashed and set aside and the matter is sent back to the first appellate court to pass fresh order in accordance with law after hearing the counsel for the parties. Rule is made absolute to this extent without any order as to costs.

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